ORIGINAL

Supreme Court, U.S.
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OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-564

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN

Petitioner,

v.

PAUL ALLEN DYE

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

JAMES KROGSRUD (P28406)
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NO. 88-564

SUPREME COURT OF THE UNITED STATES

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STATE OF MICHIGAN

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v.

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto.

BY:_____

BY:_____

JAMES KROGSRUD (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Dated: October 28, 1988

NO. 88-564

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN

Petitioner,

v.

PAUL ALLEN DYE

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, PAUL DYE, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my indigency I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Prison Legal Services of Michigan Inc.
$2.50 per day

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ___ No X

b. Rent payments, interest or dividends?

Yes ___ No X

c. Pensions, anuuities or life insurance payments?

Yes ___ No X

d. Gifts or inheritances?

Yes ___ No X

e. Any other sources?

Yes ___ No X

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

Yes ___ No X

(Include any funds in prison accounts).

If the answer is yes, state the total value of the items owned.

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

Donna M. Dye - Wife - $0.00
Paul A. Dye Jr - Son - $0.00
David G. Dye - Son - $0.00

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

Paul A. Dye

Subscribed and sworn to before me
this 27 day of October, 1988.

Kathy D. Myles
Notary Public, Wayne County, Michigan
My comm. expires 2-19-90

NO. 88-564

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN

Petitioner,

v.

PAUL ALLEN DYE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE, THE MICHIGAN SUPREME COURT ERRED IN FINDING "GOOD FAITH" UNDER BARBER v PAGE AND OHIO V ROBERTS REQUIRES THE PROSECUTOR TO EXERCISE DUE DILIGENCE IN ATTEMPTING TO LOCATE MATERIAL WITNESSES BEFORE PERMITTING USE OF THEIR PRIOR TESTIMONY AT TRIAL.

COUNTER-STATEMENT OF THE CASE

Summary

Six people are known to have been in the clubhouse of the Forbidden Wheels Motorcycle Club in the City of Detroit, Michigan, on the night of August 29, 1982. Two of them were killed. The other four were members of the Forbidden Wheels, Paul Dye, Bruce Siedel, James Dawson, and Steve Stever. Two of them were upstairs and did not see the killing, but became immediately involved in a coverup of the crime. One person fired the two shots. The other person was present when that happened, and also became involved in the coverup. Respondent Paul Dye was charged with the killing on the basis of the other three witnesses' statements. He was convicted (after one hung jury trial) of being the killer. He testified and still maintains that in reality he was the eyewitness, not the killer.

Hearing on Due Diligence in Locating Witnesses

Prior to selecting a jury on August 22, 1983, the prosecutor indicated three witnesses were unavailable, and sought permission to use transcripts of their prior testimony. Defense counsel said he had not previously been made aware of any problems in subpoenaing any of the witnesses. At a defense motion to adjourn the trial to more fully prepare, the prosecutor had told the court that some witnesses had been served and attempts were being made to serve the others. He had not specified which witnesses had not yet been served, nor had he indicated that there had been exceptional problems that were holding up service.

The officer in charge of the case, James Kuhnlein, testified about the efforts made to locate witnesses James Dawson, Steve Stever and Bruce Seidel. He said that jails, hospitals and morgues in the Metropolitan Detroit area were contacted, with no results. He also checked with MESC (Michigan Employment Security Commission) and social services, without results. Although the prosecutor had asked him to check with utility companies it had slipped Kuhnlein's mind until the morning of trial.

The prosecutor asked Kuhnlein if there had been efforts to get the witnesses' addresses when they "were in town the last time". Kuhnlein said that Dawson gave him a local address on Brady or (Grady) and Seidel had given one in Mason City, Iowa. At that time, Kuhnlein knew that Dawson had made plans to move out of town.

Efforts Regarding Dawson

At the Detroit address for Dawson, Kuhnlein said, he spoke to a young lady on August 1, 1983 (three weeks before trial). She told him that Dawson had sold her the house three weeks before that; the purchase had been made through an attorney, and the woman did not know Dawson's whereabouts.

According to Kuhnlein, Dawson's mother had not known as of July 6 where he was. She knew of the trial date, having heard from the prosecutor's office; she may have indicated that Dawson was aware of it as well. The prosecutor testified that he had himself informed Dawson of the trial date and had spoken to him by phone a number of times.

Dawson had asked the prosecutor about Respondent Dye attempts to make bond. The prosecutor had called Dawson on July 12 after hearing rumors on the street that Dawson would not appear to testify; the phone was disconnected, but the prosecutor did receive a call from Dawson a week later. There is no indication that the prosecutor obtained an address at that time.

After Kuhnlein obtained a California address for Dawson from the post office[1/] the prosecutor in that California county was contacted. Kuhnlein knew that a photograph of Dawson was sent on August 16; a L.E.I.N. message was also sent then.

The prosecutor testified that on August 5, 1983, a package containing documents relating to the Interstate Witness Act was sent to the district attorney in California with regard to Dawson's address. Kuhnlein testified that the prosecutor said on the 18th of August someone had been sent to the address and Dawson was not there. Kuhnlein did not find out if this occurred more than once, or if any other places such as utilities companies, jails, hospitals etc. were checked. The prosecutor testified that he had made a follow-up call on August 16 (six days before trial) at which time Dawson had not been served; on August 18 the California prosecutor reported the witness was not at the address given, but they would keep trying to locate him. Members of the sheriff's department in California had gone to the

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1/ Dawson's wife worked in the Northville Post Office, and Kuhnlein had the Redford post office call Northville.

house on two occasions, were told Dawson was not there at the time, and had heard he had a job lead somewhere in the area.

Efforts Regarding Stever

When Kuhnlein went to the known local address for Steve Stever (also on August 1), Kuhnlein spoke to a man who said he was Stever's tenant. The tenant said he had paid rent to someone he assumed was Stever's relative; the tenant had heard Stever might be in Tennessee, Wisconsin, or California. No forwarding address for Stever was obtained although the post office was contacted. The tenant reported he had learned in June that the house was to be repossessed; Kuhnlein called the gas and electric utilities during the lunch break on the first day of trial and verified that service in the name of Donald Stever had been discontinued at the Brady address in June. No forwarding address was given. As he had just gotten the name "Donald" Stever that day, Kuhnlein did no investigation regarding it.

The state had paid air fare for Stever from Livingston, Tennessee for the first trial. The prosecutor for that county was contacted on about July 18. The prosecutor trying this case testified that the Interstate Witness Act documents were mailed on August 5 to Tennessee. All he knew about attempts there to locate Stever was that the Tennessee prosecutor had given the subpeona to the Sheriff's Department, which was "attempting to serve" it. Kuhnlein also did not know what efforts had been made by the Tennessee prosecutor to locate Stever; Kuhnlein had called on August 19 but did not get through.

Kuhnlein had spoken to Dawson's mother on July 6, and was told that Stever had left town two days after the last trial; she doubted that he had gone back to Tennessee. Kuhnlein had an address for Stever's mother but never attempted to contact her.

Efforts Regarding Seidel

Although the address for Stever was the local address Kuhnlein had for witness Seidel, Kuhnlein did not ask Dawson's tenant about Seidel. Kuhnlein did not seek a forwarding address from the post office for Seidel, "because I knew he was in Mason City, according to his mother". Kuhnlien had been in possession of an Iowa address for Seidel throughout proceedings in this case.

Kuhnlein had spoken to an Iowa detective who said he had talked to Delores Seidel, the mother. She had said her son was out of town and that she would relay a message to have him call. Kuhnlein tried to call the mother during the day and got no answer; another officer called her at 3:00 a.m. on the 7th of July (or on June 22), and was told that Seidel was out of town, that the message for him to call would be passed on. Messages to Iowa were sent through the L.E.I.N. (Law Enforcement Information Network) on June 2 and June 22, with the same information being received. As of trial, he had not called.

The Iowa prosecutor was contacted some documents being mailed to him a week or less before trial according to Kuhnlein. The prosecutor testified that the Interstate Witness Act

documents were mailed to Iowa on August 5, 1983. The trial prosecutor testified that he spoke to someone but did not take notes as to who or when. He was informed that Seidel was apparently living at the address but the authorities had not yet been able to serve him.

On the second day of trial, the prosecutor placed on the record (outside the jury's presence) a letter that he received from the Iowa prosecutor regarding Seidel. According to the letter, an Iowa warrant had been issued for Seidel on August 11, 1983. Contacts with his former girlfriend, his mother, and an establishment favored by bikers had not resulted in information nor service of the subpeona or execution of the warrant.

Other Matters Regarding Due Diligence

The attorney for the witnesses had been contacted. He said he had not heard from them.

The Use of the Testimony at Trial

The court ruled that due diligence had been shown. The court found that the Interstate Witness Act had been complied with, "and that is all that is required as far as this Court knows. . .". Over objection, the testimony of Dawson, Stevers, and Seidel from the first trial was read into evidence. The reading was done by members of the prosector's office. At one point, defense counsel also objected to the manner and intonations used in reading the prior testimony.

At sentencing, Mr. Dye complained that he had not received a fair trial, asserting there should have been greater efforts to locate the missing witnesses. Defense counsel noted on the record that Bruce Seidel had been picked up in Iowa after Mr. Dye's conviction.

Trial Testimony

The three missing witnesses had supplied the only link between Defendant Dye and the killings. Mr. Dye testified that he awoke from a drunken sleep in the clubhouse to see Bruce Seidel standing, with a gun in his hand, over the two bodies. This was some time after the two women had heard Dawson and Stever describe in detail the firebombing they had just committed. Dawson and Stever had gone upstairs to look at the

resulting smoke. A tracking dog did lead investigators from the scene of the firebombing to within 100 feet of the clubhouse where the killings occurred. Bruce Seidel claimed to have actually seen Respondent Dye Shoot the victims. The prosecutor agreed not to use the witnesses' statement against them for their admitted involvement in cleaning up the crime scene.

Mr. Dye appealed by right. The convictions were affirmed by the Michigan Court of Appeals on May 22, 1985. The Michigan Supreme Court granted Mr. Dye's Application for Leave to Appeal and on August 2, 1988 issued its opinion reversing his conviction.

Justice Levin, writing for the majority said:

> "This appeal presents two questions. The first is whether the prosecution showed due diligence in attempting to produce the three witnesses for trial. The three witnesses were in protective custody immediately preceding and until they completed their testimony at the first trial, and were then released. Subsequent efforts to locate the witnesses for the second trial were tardy and incomplete.

Further, citing Barber v Page and Ohio v Roberts, the Michigan Court opined:

> "To establish the witness' unavailability, the proponent must establish that he has made a diligent good-faith effort to obtain the witness' presence at trial. this [sic] is a substantial requirement. 'If there is a possibility, albeit remote, that affirmative measures might produce the declarant the obligation of good faith may demand their effectuation." (emphasis in original citations omitted).

The court noted the question of "[W]hether the prosecution made a diligent, good-faith effort to produce missing witnesses is an evaluation that depends on the particular facts of each case. The record in the instant case indicates that, in the circumstances of this case, the prosecution failed to make such a diligent, good-faith effort to produce Seidel, Dawson and Stever."

After reviewing the prosecutor's efforts to locate the witnesses, including invocation of the Uniform Witness Act, the Court said:

> "Subsequent belated and incomplete efforts did not rise to the level of good-faith due diligence. The efforts to locate each should have begun earlier ...
>
> * * * * *
>
> ... Certificates were sent under the uniform act, but in themselves these did not obligate the local police to undertake a diligent search. The uniform act is a mechanism for the production of witnesses; it does not oblige local police to search for a missing witness. Invocation of the uniform act's mechanism would have been important had Dawson, Seidel, or Stever been found out of state. The act would then have enabled the local police to produce the witness for the prosecutor in Michigan. Invocation of the uniform act's production mechanism, however, is not a substitute in itself for a diligent effort to find the witnesses.
>
> The prosecution's obligation to make a diligent good-faith effort is nondelegable. If the prosecution relies on out-of-state police to follow particular leads, and they make a

diligent good-faith effort to find and produce the witness, then their efforts may discharge the prosecution's obligation. In the instant case, however, there is no evidence that the out-of-state police made diligent good-faith efforts ...

* * * * *

The prosecution should have begun the searches earlier, pressed local officers to engage in the searches, and perhaps, ... in light of the inadequate efforts of the local police -- send its own investigator. The prosecution undertook none of these steps. Such 'affirmative measures' may well have produced the witnesses.

REASONS FOR DENYING THE PETITION

In Barber v Page, 390 US 719; 88 S Ct 1218; 20 LEd 2d 255, 258, 260 (1968), this Court held, that a witness is not "unavailable" for exception to the confrontation requirement to allow use of his former testimony at trial "...unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial..." Barber v Page, supra. Petitioner argues the Court "should clarify the requirements of such "good faith efforts" and maintains the Michigan Supreme Court's holding in this case conflicts with the Court's decision in Ohio v Roberts, 448 US 56; 100 S Ct 2531; 65 LEd 2d 597 (1980). This assertion rests on a mischaracterization of the Michigan Supreme Court's ruling set forth in Petitioner's "Reasons For Granting The Writ", that "...[T]he Confrontation Clause is violated unless the requesting state somehow insures that the other jurisdiction itself makes diligent good-faith efforts to serve process on the witness...". (Emphasis in original).

Petitioner further intimates clarification of the "good faith" standard is necessary to establish uniformity between state court decisions in cases which involve similar questions under the Confrontation Clause. Commonwealth v Bohannon, 434 NE2d 163 (1982) a Massachusetts case, is offered as an example of "disparity" among state courts in application of the "good faith" standard. There, Petitioner claims, good faith was not

established because that court found the Uniform Rendition of Witnesses Act ("the Act") was invoked "too soon". This holding Petitioner contends, is contrary to the Michigan Supreme Court's holding in this case that the Act was utilized "too late" and therefore good faith was not found.

In Ohio v Roberts, this Court acknowledged its prior cases did not refine the "good faith" standard established in Barber v Page. Nevertheless, the Court recognized "general propositions [had] safely emerge[d]". These the Court implicitly identified as follows:

> "The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness'." Ohio v Roberts, supra, 65 L Ed 2d 613 (citations omitted, emphasis added).

Thus, read together, Barber v Page and Ohio v Roberts establish that a good faith effort to produce a witness requires the prosecutor to take all reasonable action(s) to do so. What constitutes reasonable action varies depending upon the particular circumstances of the case and is a function of the probability those actions will result in securing the witness for trial. Consequently, in Barber it was unreasonable for the

prosecutor to do nothing where the witness' location was known and avenues existed to secure the witness' presence at trial. The factual circumstances in Ohio v Roberts, however, led the Court to conclude that, although the prosecutor may have followed possible leads to the witness:

> "...[T]he great improbability that such efforts would have resulted in locating the witness and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution." 65 LEd 2d at 614.

Unlike the circumstances in Barber, in Ohio v Roberts, the witness' location was not known, and the prosecutor apparently knew of only one (1) person who had contact with the witness "many months" before trial. Also, it appeared trial was adjourned while the prosecutor attempted to locate the witness. Consequently, the prosecutor's arguably minimal effort of issuing subpoenas at the witness' last known address did not, in that case, evidence a lack of good faith. This is not to say, however, good faith efforts require no more than minimal or perfunctory efforts to locate witnesses. In Ohio v Roberts, the Court said affirmative measures which offer only a remote possibility of success may be required. The "good faith due diligent" test the Michigan Supreme Court applied in this case embodies one of the "safe general propositions" identified in Ohio v Roberts.

In both Barber v Page, and Ohio v Roberts, the Court

examined the prosecutor's objective conduct to determine if it established a "good faith" effort. This Court has recognized, and the Michigan Supreme Court properly acknowledged, that the question of "good faith" under Barber v Page requires a case-by-case analysis of the existing factual circumstances. Thus, entirely consistent with this Court's rulings, the Michigan Supreme Court reviewed the prosecutor's efforts to locate the witnesses for the second trial and concluded those efforts were insufficient to establish the witnesses' unavailability to allow admission of their prior testimony at trial in contravention of Respondent's right to confrontation. That court's factual findings are not binding upon this Court, but should nevertheless be given deference Sumner v Mata, 446 US 1302; 64 LEd 2d 480; 102 S Ct 1303 (1982).

The court below found "...[t]he three witnesses were in protective custody immediately preceding and until they completed their testimony at the first trial, and were then released. Subsequent efforts to locate the witnesses for the second trial were tardy and incomplete". People v Dye, 431 Mich 58, 61-62; ___ NW2d ___ (1988). (Emphasis added). In addition to these facts noted above, another relevant factor is this case involved prosecution of a double homicide. Furthermore, the witnesses provided the only evidence against Respondent. Surely, the seriousness of the crime bears upon the energy expended to locate witnesses necessary for successful prosecution. Here, the

prosecution was unsuccessful at the first trial where the jury hung 11 to 1 for acquittal. This did not escape the Michigan Supreme Court's attention. Given that the prosecutor knew when the second trial was scheduled to begin, and provided the witnesses with out-of-state, round trip, air fare for the first trial, it was unreasonable for the prosecutor to make no effort to locate, or maintain contact with the witnesses until, in one case, as late as one (1) month before trial was scheduled to start. At a minimum, one would reasonably expect the prosecutor to obtain the witnesses' out-of-state addresses before they left and/or periodically contact them. Similarly, because the witnesses were known to have come from out-of-state for the first trial, reasonable efforts to locate them would have been initiated in those locales. Instead, the officer testified at the due diligence hearing that his first efforts to find the witnesses were limited to local venues.

Due diligence is generally defined as:

> "Due diligence. Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Black's Law Dictionary, 4th ed (citations omitted, emphasis added).

Reversal in this case was not solely predicated on the prosecutor's failure to invoke the Act sooner. That fact was but one of many the court examined to determine whether diligent

efforts had been made. As a whole, the Michigan Supreme Court considered the prosecutor's efforts to locate the witnesses "tardy and incomplete". Moreover, the Massachusett court's holding in Commonwealth v Bohannon, 434 NE2d 163 (1982), contrary to Petitioner's assertion, did not result from that court's finding the Act was invoked "too soon" and does not show its application of the "good faith" standard conflicts with the Michigan Court.

In that case, the prosecutor initiated proceedings uner the Act in Florida thirteen (13) months before the scheduled trial date in Massachusetts. The Florida court declined to order the witnesses' attendance based on its finding her return would be an "undue hardship". Bohannon, p 166. Shortly thereafter, the prosecutor's motion for admission of the witness' testimony at the first trial because of her unavailability was denied. A second motion to admit other prior testimony was granted eight months later by a judge who adopted the first judge's ruling on unavailability. During the week preceding trial, the prosecutor tried to reach the witness by telephone several times. Massachusetts' highest court reversed the defendant's convictions. The court found "...reliance on [the witness'] status over one year prior to trial is inadequate to establish her "unavailability at the time of trial". The court further observed the witness' "testimony was vital" to the prosecution, and "credibility was a central issue".

The court also acknowledged resort to the Act may support a finding of unavailability if unsuccessful. Reviewing cases in other jurisdictions, the Massachusetts court said "generally that resort to the Uniform Act, coupled with a good faith effort to secure the witness's presence at trial satisfies the constitutional requirement of unavailability. Bohannon, 170 (emphasis added).

As this Court recognized in Barber, the Act was promulgated to prevent abusive manipulation of the unavailability requirement by merely establishing a witness was outside the trial court's jurisdiction. The prosecution in Bohannon and Petitioner here ask for adoption of a rule to hold that invocation of the Act, irrespective of other circumstances, satisfies constitutional mandates. This Court should reject that position. Implementation of such a standard would lead to abuses similar to those the Act was meant to remedy. Such a rule would necessarily require that the Act be invoked within a set time period which period could not be reasonable in every situation.

The Michigan Supreme Court explained why the prosecutor's duty was not discharged by resort to the Act here:

> "The Prosecution's obligation to make a diligent good-faith effort is nondelegable. If the prosecution relies on out-of-state police to follow particular leads, and they make a diligent good-faith effort to find and produce witnesses, then their efforts may discharge the prosecution's obligation."

This was simply another "safe general proposition", i.e., that appointment of an agent does not relieve a principal of his obligation. There was no evidence presented to show the out-of-state police made a diligent good faith effort to locate the witnesses. This observation is not contrary to the holding set forth in Ohio v Roberts, supra.

Moreover, the prosecutor's utilization of the Act could not have reasonably been expected to yield the witnesses in time for trial. Packets of materials under the Act were not sent until a scant 2 weeks before trial. Photographs to assist in identifying the witnesses were then forwarded approximately one (1) week later. Had the witnesses been located within that period, it is likely required court proceedings under the Act would would not have been completed in time for trial. This is particularly so where the prosecutor did not seek an adjournment to allow them more time to find the witnessess.[2/] The Michigan Supreme Court did not hold the prosecutor was required to press local authorities and perhaps send its own investigators to the other states. Rather, the court said these things should have been done in this case. This was not hindsight, but examples of action warranted under the circumstances. All of the steps taken earlier failed and trial was imminent. Despite this, the prosecutor neither accelerated nor escalated its efforts to

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2/ See People v Schepps, 217 Mich 406; 186 NW2d 508 (1922), where prosecutor requested continuances.

locate the witnesses, directly or through out-of-state authorities. None of the courses of action which the Michigan Supreme Court suggested would have been appropriate can be considered unreasonable in this case. Nor would the inconvenience or expense of such action excuse the failure to take such steps. California v Green, 399 US 149; 26 LEd 2d 489, 515, fn.22; 90 S Ct 1930 (1970).

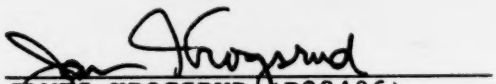
If the Michigan Supreme Court's "good faith due diligence" standard is not synonomous with this Court's "good faith" standard, the due diligence standard under Michigan law is nevertheless, is an adequate and independent basis for the decision below. Justice Archer noted in his concurring opinion that Michigan had required prosecutors to exercise due diligence to produce material witnesses before it was held that the Sixth Amendment applied to the states. He concluded that the prosecutor had not exercised due diligence. Justice Brickley agreed "the due diligence standard was violated."

CONCLUSION.

There is no fundamental federal question involved in this case when fully and correctly analyzed. Therefore the Court should deny the Petition for Writ of Certiorari and Affirm the Michigan Supreme Court's ruling.

Respectfully submitted by:

STATE APPELLATE DEFENDER OFFICE



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Dated: October 28, 1988

NO. 88-564

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN

Petitioner,

v.

PAUL ALLEN DYE

Respondent.

*** PROOF OF SERVICE ***

MARY L. SAWNICK, being first sworn, says that on October 28, 1988, she mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
ON PETITION FOR A WRIT OF CERTIORARI TO THE
MICHIGAN SUPREME COURT
RESPONDENT'S BRIEF IN OPPOSITION
PROOF OF SERVICE

TO: Clerk, Michigan Supreme Court
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Wayne County Prosecutor's Office
Appellate Division
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Clerk, Court of Appeals
900 First Federal Bldg.
1001 Woodward Avenue
Detroit, MI 48226

Mr. Paul Dye
2243 Millenbach
St. Clair Shores, MI 48081

Mary L. Sawnick
MARY L. SAWNICK

Subscribed and sworn to before me
this 28th day of October, 1988

Maria D. Sawnick
Notary Public, Wayne County, Michigan
My commission expires: 9/18/90